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IN THE

Supreme Court of the United States

October Term, 1963

No. 698

WORZ, INC., PETITIONER,
v.
FEDERAL COMMUNICATIONS COMMISSION
AND
MID-FLORIDA TELEVISION CORP.,
RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LUCIUS J. CUSHMAN
Suite 501, Ainsley Building
Miami, 32, Florida

LEE G. LOVETT
Lovett & Lovett
734 15th Street, N. W.
Washington 5, D. C.

Attorneys for Petitioner

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WORZ, INC., Appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case July 5, 1963, upon the Federal Communications Commission's report and recommendations following a remand (R. 154-157) of the case to the Federal Communications Commission with instructions (R. 156) that the Commission "hold with the aid of a specially appointed examiner, an evidential hearing to determine the nature and source of all '*ex parte*' pleas and other approaches

that were made to Commissioners while the proceeding was pending, and any other factors that might be thought to require either disqualification of some Commissioners from participating in the re-opened proceeding, or disqualification of some parties from receiving any award that may ultimately result".

However, the Court of Appeals retained jurisdiction of the proceedings (R. 157 and see 106 U. S. App. D. C. 14; 268 F. 2d 889).

OPINION BELOW

The opinion of the Court of Appeals (Appx. 1a, et sec.), and the supplemental opinion upon petition for rehearing *en banc* (Appx. 7a), have not yet been reported.

JURISDICTION

The judgement of the Court of Appeals was entered on July 5, 1963 (Appx. 6a). By order and supplemental opinion dated September 23, 1963, that Court denied Appellant's petition for a rehearing *en banc* (Appx. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Upon the opinions rendered by the Court of Appeals, we find that the following questions are presented:

1. Where the Court below improperly condoned, and improperly failed to find erroneous,

the action of the Commission in basing its findings on selected parts of the record and disregarding other parts which would require different findings, is the court below required, under the Administrative Procedure Act and under the *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, to review the *whole* record?

2. Where a corporate party to an adversary proceeding seeks and attempts, *ex parte*, to influence, subvert, or corrupt the adjudicatory processes of a court or other tribunal, through its attorney or agent, is such corporate party barred from any relief in such proceeding whether or not its officers, directors, or stockholders knew of such acts or conduct of its attorney or agent, regardless of the degree of success achieved thereby?

3. Where a principal fails to disavow and repudiate the misconduct of its emissary, agent or attorney, which was in the furtherance of its interest, upon gaining knowledge thereof, is such principal deemed to have ratified and affirmed the actions and misconduct of such agents?

4. Where a trail examiner, who has been appointed with the consent of the parties and the approval of the United States Court of Appeals for the District of Columbia, renders purely factual findings and conclusions which are predicated upon his observation of witnesses and his determination of their *credibility*, does an administrative body have the authority to substitute its judgment, for that of the Examiner, as to the credibility of the witnesses and to set aside such Examiner's findings based thereon?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

No person shall. . . be deprived of life, liberty, or property, without due process of law; . . .

Section 10(e) of the Administrative Procedure Act, "An Act to improve the administrations of justice by prescribing fair adminstrative procedure", 5 U.S.C. 1009, provided in pertinent part:

(e) Scope of review. - So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; . . . in making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

This is the second time this case has been before the Supreme Court of the United States. Appellant appealed to the United States Court of Appeals for the District of Columbia Circuit from a Federal Communications Commission's decision released on June 7, 1957, denying Petitioner's application for a permit to construct a new commercial television station to operate on Channel 9 at Orlando, Florida, and granting the conflicting application of the Intervenor, Mid-Florida Television Corporation. In doing so, the Commission reversed[1] the Hearing Examiner's[2] Initial Decision (First United States Supreme Court Record, case Number 349, as filed on September 8, 1958, 70-136) proposed a grant of the WORZ application, his preference being based upon "many reasons" of which 12 were listed as being "the most important." First U.S.S.C. R., J.A. 133-136.) Mid-Florida was not accorded a single point of preference.

In its utter disregard for the record as a whole, the Court of Appeals for the District of Columbia Circuit affirmed, with a per curiam opinion, the

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[1] The first comparative hearing was held in December 1954 and March 1955. The Initial Decision was released on August 10, 1955. The Commission heard oral argument of June 18, 1956, and released its Decision on June 7, 1957. Mid-Florida, at its peril, elected to proceed with construction under its permit pending the outcome of review proceedings.

[2] The first Examiner, Basil P. Cooper, became a member of the Commission's lagal staff in January 1935, and, except for a period of military service, so continued until his appointment as an Examiner in July 1948. (FCC News Release, July 21, 1948.) His experience and integrity are well established.

Commission's Order granting the Mid-Florida application (103) U. S. App. D. C. 195, 257 F. 2d 199), despite WORZ's graphic showing, included in its ten appendices to its reply brief, exemplifying the Commission's disregard of the record. During the argument before that court *not one word was uttered by counsel for either the Commission or Mid-Florida* attacking the correctness of the appendices which showed that the Commission relied not upon the record but upon the suggestions of Mid-Florida or of the Commission's Broadcast Bureau as to the significant party-in-interest issue against WORZ.

Thereupon, Petitioner, on September 8, 1958 filed with the Supreme Court of the United States a petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit. On October 27, 1958, the Supreme Court granted the certiorari and vacated the judgement of the said Court of Appeals and remanded the case (358 U. S. 55).

On May 21, 1959, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's Order granting the Mid-Florida application and remanded the case to the Commission with instructions as above stated.

In accordance with the mandate, the Commission, On July 29, 1959, re-opened the record and ordered a further hearing to determine four issues: (1) whether any Commissioners who participated in the grant to Mid-Florida should be disqualified from participating in the reopened proceeding, (2) whether there had been any at-

tempt to influence any Commissioner "except by the recognized and public processes of adjudication", (3) whether any party had "directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings", and (4) whether either of the applicants "should be disqualified from receiving a grant of its application" or be held guilty of conduct reflecting adversely upon such applicant from a comparative standpoint.

Thus the remand hearing did not require any particular expertise, but only experience in appraising witnesses, and separating facts from fiction, and the ability to determine whether there had been any attempt to influence any Commissioner "except by the recognized and public processes of adjudication", and whether any party had "directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings". The issues were essentially those of fact and involved the conduct of a proceeding under usual rules applicable to the administration of justice, followed by the determinations of a "specially appointed hearing examiner". Such determinations, obviously were to be governed by the "specially appointed examiner" and his appraisal of the witnesses whom he observed as they testified and noted their demeanor, their intelligence, and their prejudice together with their *interest in the outcome of the proceeding*.

After the remand of the case to hold the evidential hearing with the aid of a specially appointed hearing examiner, and to report to the United

States Court of Appeals for the District of Columbia Circuit, Honorable James D. Cunningham[3], Commission Chief Hearing Examiner, *with the consent of all the parties* including the Commission's general counsel,[4] was appointed and the appointment approved by Order entered by the said Court of Appeals March 16, 1961.

The Chief Hearing Examiner was not to submit a mere advisory report but was to render an initial decision, that is, to make findings of fact and reach conclusions of law - - to determine questions of both fact and law.

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[3] The second Examiner, James D. Cunningham, first became a member of the Commission's legal staff in 1934 and, except for a period of military service, so continued until his appointment as an Examiner in June 1947. He was elevated to the position of Chief Hearing Examiner in December 1954. (FCC Public Notice, December 9, 1954.) He and Mr. Cooper are probably the most experienced Examiners associated with the Commission. Col. Cunningham's position as Chief Hearing Examiner is evidence of the high regard in which he is held by the Commission, and his special selection to preside over the instant remand proceeding and the submission of his name to this Court are further evidence of the confidence which is reposed in him.

[4] It is important to note that the Office of the General Counsel participated most actively in the remand proceeding; in fact, the General Counsel's representatives carried the burden of presenting the evidence to make possible a determination of the issues, and in the course thereof introduced 25 Commission exhibits. In their proposed findings and conclusions of law they found that "one or more of the principals of Mid-Florida directly or indirectly secured, aided, confirmed, ratified, or knew of Dial's misconduct", and concluded that **Mid-Florida "should be absolutely disqualified from any further comparative consideration for Channel 9".** Ironically, the General Counsel must now espouse the opposite view — the view that the Commission adopted when it decided to adhere to its original determination in favor of Mid-Florida, reversing its first Examiner, and, to that end, also to reverse its second Examiner and to hold that he was wrong in not believing the Mid-Florida principals, and in

The factual phase of the proceeding was found to revolve about the so-called *Roth incident*, which was the reason for Mid-Florida's re-employment of one *William H. Dial*, an Orlando, Florida, attorney, who proceeded to make to then *Commissioner Richard A. Mack* the improper "ex parte" presentations while the matter was subjudice, which resulted in the Supreme Court's reversal of said Court of Appeals affirmance of the Commission's decision. It was upon the recommendation of Dial that the late Hyman N. Roth, also an Orlando attorney, was employed by the Mid-Florida group to organize the television corporation and make local contacts. He became the secretary, a director, and a stock subscriber, and testified in both the orginal and the remand proceedings.

As explained to the said Court of Appeals initially (1957 and 1958), the so-called Roth inincidently involved a letter dictated by Roth and sent to the Commission on November 3, 1953, just four days after he had completed the incorporation of Mid-Florida. It was written on the letterhead of the Orange County Bar Association, of which Roth was then President, and

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concluding that they knew of and ratified the proved improper ex parte presentations made by their attorney and agent in the furtherance of their cause. In other words, as far as the Commission is concerned, the Mid-Florida principals can do no wrong, and the Commission will hear no evil or see no evil about or in them, and will pay no attention to those who, through a sense of fair play and regard for the factual circumstances, speak "evil" of them. This seems particularly significant when it is recalled that, in the original proceeding, the Commission refused to accept the first Examiner's findings based upon his belief in the credibility of the WORZ principals and other witnesses called on behalf of WORZ.

bore the purported signature of Irving M. Felder, its Secretary. (First U.S.S.C. R., J.A. 41.) It even bore Mr. Felder's dictation symbols-"IMF". Mr. Felder denied that he signed it but stated that the signature "looks like mine". Roth, while not admitting that he simulated Felder's signature,[5] assumed full responsibility for the letter. (First U.S.S.C. R., J.A. 266-270.) It sought, as an official act of the Orange County Bar Association, to cast reflection upon WORZ, INC., through Mr. Murrell, Sr., a Jacksonville lawyer and the husband of the WORZ president. The first Examiner gave a substantial demerit to Mid-Florida for its effort thus *"to deceive and mislead the Commission"*. The Commission, however, while critical of Roth's conduct, observed that it was merely that "of a minor stockholder of the minority group, although an officer and director of the corporation" and that "There is also present the fact that Mr. Roth did have *some color or right to utilize the signature of the Bar Association President*".[7] (Emphasis supplied.)

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[5] WORZ Exhibits 21 and 22, First U.S.S.C. R., J.A. 16 and 41. Until its Report (R. 174, Par. 5), the Commission had religiously avoided the use of the word "forgery" in connection with Roth's action. Now it refers to Roth's **"quasi-forgery** of Felder's name (sic)".

[6] The first Examiner went on to say: "Prior to the close of the hearing, all officers, directors and stock subscribers of Mid-Florida knew or could have learned from reading the record that the Commission had been deceived and mislead by a principal officer and director of Mid-Florida. They have made no attempt to disavow the act of deceit practiced so successfully upon the Commission". (First U.S.S.C. R., J.A. 135.)

[7] By inadvertently using the title of "President" here the Commission actually spoke the truth, because that was Roth's official designation. However, the Commission no

The use of the phrase "color of right" shows the extent the Commission went to favor Mid-Florida. Obviously, there could be no "color of right" to forge Mr. Felder's signature and use his dictation symbols when the letter did not even concern the business of the Bar Association and would not have been written by Mr. Felder himself.[8] (Mr. Felder testified that he would not have written the letter because it was not Association business. Felder Dep., first U.S.S.C. R., J.A. 15.) Nonetheless the Commission then concluded that "the conduct of the principals of WORZ weigh much more heavily against a grant to that applicant than does that of Mr. Roth against grant of the application of Mid-Florida." (Dec. Concl., 76 first U.S.S.C. R., J.A. 308.) However, the Commission did admit that even *its* finding and conclusions did not warrant disqualification of WORZ. (Concl. 62, first U. S. S.C. R., J.A. 301.)

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doubt meant to say "Secretary", which was the title of Mr. Felder whose "signature" the Commission claims Roth had some "color of right" to use. The Commission never attempted to show why, if he had such "color of right", he should have not only forged Mr. Felder's signature rather than to write it in a normal manner but also have gone to the length of inserting Mr. Felder's dictation symbols.

[8] Mr. Felder testified that he would not have written the letter because it was not Association business. Felder Dep., (First U.S.S.C. R., J.A. 15.) The procedure used was obviously intended to deceive. Roth clearly acted in a despicable manner, and the other principals of Mid-Florida knew full well that he had done so, or should have known long before the record was closed. But not one of them uttered a word of surprise or disavowal either at that time or thereafter. As it turned out, the letter served its purpose because, apparently, it sparked the Commission's prejudice against WORZ.

After the issuance of the first adverse Initial Decision, the Mid-Florida principals became frantically concerned over the Roth incident and the importance that it might play in the ultimate decision. Thereupon, Joseph L. Brechner and John W. Kluge, officers, directors, and principal stock subscribers of Mid-Florida, re-employed William H. Dial, the Orlando attorney who had previously represented the group and who had proved to be an admirable "fixer". (In 1954 Dial had been retained by Mid-Florida in the defense of a suit brought by WORZ to have the corporation's stock subscription agreements declared void because of non-compliance with the Florida blue-sky laws. Through a lawyer friend, Dial was able to *induce* the Florida Securities Commission to go along with a nunc-pro-tunc procedure. Dial, after reporting the good news to Mid-Florida president Brechner, then wrote to his friend: "Mr. Brechner asks that I congratulate you and thank you for the fine work that you have done in inducing the Commission to go along on this basis." (WORZ Ex. C. R. 2.) They wanted Dial to investigate the Roth matter and learn, particularly, whether the local Bar Association contemplated any adverse action. In other words, Dial was to be their emissary - their secret agent to investigate and report. (Black's Law Dictionary, p. 616.). Dial, happily, proved to be an old friend of Commissioner Richard A. Mack. Following his investigation, Dial, at Mid-Florida's request and expense, came to Washington and, on October 17, 1955, met with Kluge, Brechner, and Paul Dobin, Mid-Florida Washington counsel, in Kluge's office. (R. 8.) Before

the meeting, Dial had attempted to reach Mack by telephone and had left a message. There is no question but that, during the conversation in Kluge's office, the Roth matter and the means of eliminating any prejudicial effect thereof upon the Mid-Florida application and the importance of doing so *prior to oral argument before the Commission* (held June 19, 1956) were thoroughly discussed, also that Dial received a call from Mack and they made a dinner engagement for that evening, of which fact he advised those in Kluge's office. (R 80.) Dial immediately thereafter went to work on Mack with his *ex parte* representations against WORZ and in favor of Mid-Florida.

Although Dial "hesitated to testify" that the Mid-Florida principals knew that *he intended to discuss the Orlando television case with Mack*, he "couldn't deny" the fact, and no one told him not to discuss the case with Mack (R. 81-82), and he knew that he told them that he was having dinner with Mack (R. 80-82.) Certainly, Mid-Florida had furnished him with copies of the Initial Decision and the pleadings so that he could be completely informed about the case. Furthermore, Dial felt that, as a friend of Mack, he could talk to him about anything, and that, even as a lawyer, he saw nothing improper in discussing the case with him. (R. -61.) It was, therefore, only natural and normal for him to have at least mentioned to his clients and friends, the Mid-Florida principals, his friendship with Mack and his intention to talk to him about their case and thus, possibly, to give it a much-needed boost. It was also only natural for Dial, at the

remand hearing, to endeavor to protect his former clients even though he may have had no personal interest in the outcome of the proceeding except, possibly, to try to make amends for having recommended to the Mid-Florida group their employment of Roth. Messrs. Brechner and Kluge, on the other hand, were *unusually* interested in the outcome of the case.

The Chief Hearing Examiner, after observing the witnesses and hearing all of the testimony, found as a fact (J.A. 23) that-

> "... The finding is here compelling, *notwithstanding the uncertainty of the testimony* of the four men (Dial, Kluge, Brechner, and Dobin), that, during the course of these discussions, *Dial informed the group of his telephone call from Mack and of their friendship and dinner engagement*. In light of the record as a whole, *any suggestion that the Mid-Florida principals were unaware of the existence of this friendship must be rejected.*" (Emphasis supplied.)

The decisions of the Court of Appeals for the District of Columbia allows the Commission to read into the record "some color of right" in favor of Roth's forgery of Felder's signature. In the first Examiner's preference for WORZ, and now read out of the record the second Examiner's rejection (R. 30) of the self-serving denials of Mid-Florida's principals "in the light of the record as a whole", as unreasonable, incredible, and contrary to normal human experience".[9]

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[9] "Although Dial considered his repeated 'ex parte' approaches to Mack wholly improper, he would not advise the

The decisions would permit the Commission for the second time to reverse a learned, respected, and experienced Examiner who felt obliged, after observing the witnesses as they testified, and considering the record as a whole, to come to a conclusion adverse to Mid-Florida, *although the Commission did not see them on the witness stand nor have an opportunity to judge their candor and demeanor.*

The Commission did agree with the second Examiner that neither WORZ, Inc., nor any of its principals, in the words of the Examiner (R. 31) "directly or indirectly, secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceeding, and therefore, further found that this party is not disqualified from receiving a grant of its application."

This petition seeks review of a judgment (Appx. 6a) by the Court of Appeals for the District of Columbia Circuit upon the Federal

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Mid-Florida group under any circumstances that he made them or intended to do so. This circumstance would appear to be of significance herein, for if Dial had no compunction regarding these approaches and saw no impropriety in them since he was acting as a citizen of his community and not as the agent of representative of Mid-Florida, it is inconceivable and incredible that, in such a frame of mind, he would not and did not notify the Mid-Florida group by whom he had been retained and with whom he had been working closely, that, in the citizen's role, he was bringing to Mack's attention the importance of issuing the television permit to those who, in his judgment, would best serve the Orlando area. Obviously, while on the witness stand the individuals concerned were cognizant of the seriousness of the consequences which would attend a finding of knowledge of Dial's activities on the part of Mid-Florida." The Examiner thus points out the inconsistency and inherent improbability of the testimony.

Communications Commission's report and recommendations following remand to said Federal Communications Commission by said Court of Appeals on May 21, 1959, (R. 154) in which said Court of Appeals *first* accepted the majority conclusion of said Federal Communications Commission that upon reconsideration of the mutually exclusive applications of WORZ, Inc., a Florida Corporation, and Mid-Florida Television Corp., a Florida corporation, that neither Mid-Florida nor WORZ, Inc., is to be deemed automatically disqualified, and second, said Court of Appeals rejected the majority Commission recommendations that new consideration be merely "on the basis of the existing record, with no further hearing contemplated and with no demerit to Mid-Florida by reason of the evidence which came to light and resulted in the remand", and instead, specified that said Commission in its decision on all matters, should review and consider the record including all proceedings had upon the previous remand of said case by said Court of Appeals; and third, leave opinion to said Federal Communications Commission to decide in the first instance, whether Mid-Florida, Television Corp. could insulate itself by unawareness of the consequences of improper activities expended in its behalf by its attorneys, and finally, left up to the discretion of said Federal Communications Commission (1) a determination as to whether or not to reopen the record and permit the filing of new applications and their consideration upon a new record; (2) in making that detision, to reassess the qualifications of both Mid-Florida and WORZ, Inc.,

and (3) in reappraising said qualifications of said parties named. Federal Communications Commission should weigh the serious question as to the character of WORZ's principals; and at the same time, weigh the effect of Mid-Florida's acceptance of whatever deceptive activities Roth had engaged in, as found by the Commission, at the time he was secretary of and stock subscriber in Mid-Florida Television Corp., and also what effect the Commission would give to Roth's conduct and to Dial's *ex parte* activities in behalf of Mid-Florida, at the time he was acting as its attorney; (4) a decision by Federal Communications Commission after new oral argument on all aspects of all matters, whether or not a new public interest determination should be ordered, since the record is so stale, and finally, if so, acceptance of new applications from new untarnished applicants, and whether such new applications should require excluding the present parties from participation in the reopened proceedings. (R. 215-219.)

These decisions, in substance and effect, placed the mutually exclusive applications of WORZ, Inc., and Mid-Florida Television Corp., for a permit to construct a commercial television station to operate on Channel 9 in Orlando, Florida, back in the same status in which they stood prior to the decision of June 6, 1957, by which the Federal Communications Commission denied the application of WORZ, Inc., for a construction permit for a television station on Channel 9 in Orlando, Florida, and awarded the permit to another applicant, Mid-Florida Television Corp. (In re-applications of WORZ, Inc., et al., 22 F.

C.C. 1254.) In other words, the effect of the judgement of the Court of Appeals (Appx. 6a) was to return the proceeding which had a long and torturous course, extending over a period of approximately ten years, back to the point where it stood six years ago, and to deprive Petitioner of all of the fruits of litigation during the past six years, even though neither Petitioner nor its principals has ever been found guilty of any unlawful or improper conduct in said proceedings. In view of the fact that the Commission has (1) reversed two highly respected and experienced examiners who found for WORZ, and (2) has ignored the findings of the trier of fact as to credibility of the witnesses, and the *then* views of its Office of the General Counsel, which would void the award to Mid-Florida and disqualify the latter, it is highly unlikely that the further oral argument, presently scheduled for March 2, 1964, before the Commission, will result in a change of the Commission's position. To paraphrase an ancient addage, "What is past would surely seem to be prologue".

REASONS FOR GRANTING THE WRIT

First, Petitioner believes that the court below has failed to perform its statutory duty in reviewing the herein decision of the Federal Communications Commission. It has failed to require the Commission to make findings based upon the whole record and not merely upon those portions that suit its purpose. The decision below if permitted to stand, would have a serious impact upon procedure not only before the Commission but also before other Federal regulatory agencies

and upon the Constitutional and statutory safegards provided for persons regulated by such agencies.

Section 10(e) of the Administrative Procedure Act requires that the court "shall review the whole record or such portions thereof as may be cited by any party": This Court, in *Universal Camera Corporation v. National Labor Relations* Board, 340 U. S. 474, at 488, in referring to the Administrative Procedure Act, stated: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."

As heretofore mentioned, petitioner, in its reply brief below, dated March 5, 1958, included ten appendices exemplifying the Commission's omission of parts of the record that detracted from the weight of the evidence which it incorporated in its findings upon the decisional question of the candor of the members of the Murrell family. The Commission considered so important those "factors not normally present in comparative hearings" that it devoted 23 findings (No. 32-55, first U.S.S.C. R., J.A. 213-228) and 20 conclusions (No. 48-68, first U.S.S.C. R., J.A. 294-304) thereto. Far more oral testimony was devoted to these factors than to the other phases of the case.[10] Therefore, the Commission had a large volume of material from which to se-

[10] The Record here includes the First and Second Joint Appendices below which contain 391 and 117 letter-size pages respectively, but does not include the many pages of the Commission's decision which were not necessary to a consideration of the points raised on appeal.

lect only that which supported its objective. The *per curiam* opinion of May 15, 1958, by implication, sanctions this practice and, unless this Court asserts itelf, the way will be open for a reversion to the pre-Administrative-Procedure-Act tendency to approve administrative findings if there be "substantial evidence" to support them regardless of the fact that there might be incontrovertible other evidence of record which would destroy it. *As stated by this Court in the Universal Camera case, supra, that was the reason for the insertion of Section 10 (e) requiring reviewing courts to consider the "whole record".*[11] This the lower court obviously failed to do.

Second, when a party to an adversary proceeding seeks and attempts, ex parte, to influence, subvert or corrupt the adjudicatory processes of a court or other tribunal, through its attorney or agent, such a party should be barred from any relief in such proceedings, whether or not its officers, directors or stockholders knew of such acts of conduct of its attorney or agent, and regardless of the degree of sucess achieved thereby, because only by such a rule can the purity and integrity of the adjudicatory processes of courts or other tribunals be preserved. In fact, the decision of the Federal Communications Commission and the Court of Appeals for the

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[11] In sole support of its inaction, the **per curiam** opinion cites **Tampa Times Co. v. Federal Communications Commission**, 97 U. S. App. D. C. 256. However, in that case the "crucial consideration" was admittedly the "Commission's judgment" upon the past record of the key figure in the successful corporate applicant. In this case it is not a question of the Commission's **permissable judgment** but of the Commission's **disregard of proved facts.**

District of Columbia Circuit imposed upon WORZ, the burden of establishing by direct evidence knowledge on the part of officers, directors or stockholders of Mid-Florida Television Corp., of the attempt by its attorney or agent, by means of its ex parte representations to a member of the Federal Communications Commission, to influence, subvert, or corrupt the adjudicatory processes of that tribunal, regardless of the fact that such matters were and are peculiarly and exclusively within the knowledge of Mid-Florida Television Corp., and its officers, directors or stockholders, and regardless of the fact that it is impossible, in any such case, to ascertain or determine with any degree of certainty, the extent to which such improper conduct did, in fact, influence the action of the Federal Communications Commission, and we respectfully submit that the rule announced in *Root Refining Co., v. Universal Oil Products Co.*, 169 F. 2d 514, requires that Mid-Florida Television Corp., upon the facts before the Federal Communications Commission, be absolutely disqualified from receiving the television grant or retaining the same, and be disqualified from further participation in said proceedings without regard to whether its opponent, WORZ, has been able to wring from the lips of the officers, directors, stockholders and attorney for Mid-Florida Television Corp. a full confession of the conduct of said Corporation's agent or attorney, and its effect upon the decision of the Federal Communications Commission.

Third, the decision of the Federal Communications Commission and the United States

Court of Appeals for the District of Columbia Circuit, by their respective decisions, have wholly failed to charge Mid-Florida Television Corp. with the consequences of the action and misconduct of its emissary, agent or attorney in the furtherance of its interest after gaining knowledge thereof, and thereby permitting Mid-Florida Television Corp. to retain the fruits of the wrongdoing of its agent and attorney, without the consequences thereof.

Fourth, the decision of the Federal Communications Commission overturned and refused to follow the findings and decisions of an Examiner appointed with the consent of the the parties and the approval of the United States Court of Appeals for the District of Columbia Circuit, and permitted the Federal Communications Commission to substitute its judgment for that of said Examiner as to the credibility of the witnesses who appeared personally before said Examiner, and thereby deprived the applicant, WORZ, of the full benefit of testimony and evidence produced before said Examiner. (See Kimberly v. Arms, 129 U. S. 513.)

The second Examiner's Findings as to the veracity of the Mid-Florida principals may not, in any event, be overruled without a very substantial preponderance of the testimony, and such preponderance is manifestly absent herein. In *Universal Camera Corp. v. National Labor Relations Board* (Feb. 1951), 340 U. S. 474, the Supreme Court observed (at 493) that, under the Administrative Procedure Act, as well as the Taft-Hartley Act, a reviewing court is to deter-

mine the *"substantiality of evidence on the record including the examiner's report"*. Later the Court said (at 496):

> "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree . . . that evidence supporting a conclusion may be less substantial *when an impartial, experienced examiner who has observed the witnesses and lived with the case* has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the *consistency and inherent probability of testimony*. The significance of his report, of course, depends largely on the *importance of credibility* in the particular case . . . ". (Emphasis supplied.)

In that case the Court of Appeals (2nd Circuit) had affirmed the order of the National Labor Relations Board which had overruled the Examiner's findings of fact and his recommendation that the complaint be dismissed. *The Supreme Court remanded the case and stated (p 497) that the Court of Appeals should "accord the findings of the Trial Examiner the relevance that they reasonably command* in answering the comprehensive question whether the evidence supporting the Board's order is substantial." Upon reconsideration in the light of these instructions, the Court of Appeals through *Judge Learned Hand*, gave proper weight to the Examaminer's findings and reversed the Board's Order. In so doing, it stated that *"an Examiner's*

findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded", especially when the findings are "based on that part of the evidence which the printed words do not peserve". *National Labor Relations Board v. Universal Camera Corp.* (July 1951), 190 Fed. 2d 429, 430. This reasoning was followed in *N.L.R.B. v. Supreme Bedding & Furniture Manufacturing Co.* (4th Cir,:. 1952), 196 F. 2d 997, which reversed the Board's Order that had overruled its Examiner. The Court there held that *the Examiner had the superior opportunity to observe the witnesses and to determine their credibility.*

In the instant case the credibility of the witnesses, who were vitally interested in the outcome of the proceeding, is of great importance, and their testimony must be measured by its "inherent probability". And, to paraphrase the Supreme Court's statement in the *Universal Camera* case, because of the *"importance of credibility"* of the Mid-Florida principals, the determinations of the Chief Hearing Examiner take on added significance.

The Commission majority significantly makes no effort to rely upon a substantial preponderance of the testimony. This is because they must rely *only* upon the denials of the very witnesses who are so substantially interested in the outcome of the case, and who, to use the Examiner's words (R. 31, Par. 4), "were cognizant of the seriousness of the consequences which would attend a finding of knowledge of Dial's activities on the part of Mid-Florida."

As noted by the Chairman of the Commission in his dissent (R. 41): "The Examiner who heard and saw the witnesses found that responsible officers and stockholders of Mid-Florida knew of, and ratified, Mr. Dial's improper approaches. The record does not justify the majority's reversal of this finding." The Chairman went on to conclude (R. 41):

> "It is clear to me that the Examiner did not brush aside 'sworn denials' of Mr. Dial and the Mid-Florida witnesses on the basis of an indefinable 'human experience.'" (Majority Report and Recommendation, par. 12, p. 5.) The human experience on which he relied is the experience which all of us have had with the ways men act in circumstances such as those this record reveals. As between the common sense teaching of that experience and the *denials of heavily interested witnesses*, he chose to rely on common sense. So do I. (Emphasis supplied).

Thus the Chairman would follow normal and logical procedure and to the above extent would give to the determinations of the trier-of-the-facts the weight to which they are entitled and would also recognize that the trier-of-the-facts is not required to accept testimony which he does not believe, even though it be uncontradicted. This is particularly true where the witness is *interested in the outcome of the case. Young Ah Chor v. Dulles* (9th Cir. 1959), 270 F. 2d 338, 341.

CONCLUSION

We do not have here an ordinary case of "unclean hands", in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior. This case concerns corrupt tampering with the adjudicatory process itself.

Therefore, in order that the constitutional and statutory standards of proceedings, as interpreted by this Court may be enforced, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEE G. LOVETT
Lovett & Lovett
734 15th Street, N. W.
Washington 5, D. C.

LUCIUS J. CUSHMAN
Suite 501, Ainsley Building
Miami, 32, Florida

Attorneys for Petitioner

December 23, 1963

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13996

WORZ, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

MID-FLORIDA TELEVISION CORPORATION, INTERVENOR

On Federal Communications Commission's Report and Recommendation following Remand by this court on May 21, 1959

Decided July 5, 1963

Mr. Eliot C. Lovett, with whom *Mr. Lee G. Lovett* was on the brief, for appellant.

Mr. Daniel R. Ohlbaum, Associate General Counsel, Federal Communications Commission, with whom *Mr. Max D. Paglin*, General Counsel and *Mrs. Louise H. Renne*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Messrs. Richard M. Zwolinski*,

Ernest O. Eisenberg and *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, also entered appearances for appellee.

Mr. Marcus Cohn for intervenor. *Messrs. Leonard H. Marks* and *Paul Dobin* also entered appearances for intervenor.

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges*.

PER CURIAM: On May 15, 1958, in WORZ *Inc.* v. *Federal Communications Comm'n*, 103 U. S. App. D. C. 195, 257 F. 2d 199 (1958) we affirmed the order of the Commission granting television Channel 9 in Orlando, Florida, to Mid-Florida Television Corporation. The Supreme Court, in *WORZ, Inc.* v. *Federal Communications Comm'n*, 358 U. S. 55, on October 27, 1958, upon the basis of representations made by the Solicitor General concerning possible ex parte communications made on behalf of Mid-Florida to Commissioner Mack, which if made had not been known when the case was before this court, vacated our judgment and remanded the cause to this court for such action as we should deem appropriate. On May 21, 1959, we vacated the order of the Commission which we had previously affirmed and remanded the case to the Commission.

> with instructions to hold, with the aid of a specially appointed hearing examiner, an evidential hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to Commissioners while the former proceeding was pend-

ing, and any other factors that might be thought to require either disqualification of some Commissioners from participating in the reopened proceeding or disqualification of some parties from receiving any award that may ultimately result. All parties to the former proceeding and to the present review may on request participate fully in the evidential hearing. The Commission is instructed to report its progress to this court within sixty days, together with any recommendations it is then able to make. In the discretion of the Commission existing services may be maintained.[3]

WORZ, Inc. v. Federal Communications Comm'n, 106 U. S. App. D. C. 14, 15, 268 F. 2d 889, 890 (1959). We retained jurisdiction pending our further order.

As a consequence of proceedings on the remand to it, the Commission, while not disturbing Mid-Florida's service allowed under an earlier authorization, and after filing interim reports with this court, filed its present Report and Recommendation under date of January 8, 1963.

The Commission had reopened the record and held a further hearing before a Chief Hearing Examiner on the issues pertinent to the remand. The Examiner made an Initial Decision, which the Commission considered before making its Report and Recommendation now before us. Chairman

[3] Wrather-Alvarez Broadcasting Inc. v. FCC, 101 U. S. App. D. C. 324, 329, 248 F. 2d 646, 651.

Minow filed a dissenting statement with the Report and Recommendation. At the request of parties we set the matter down for oral argument and for consideration on briefs directed to the Report and Recommendation.

All participating members of the Commission agree that neither Mid-Florida nor WORZ is disqualified but that the case should be considered anew on oral argument and a decision made on the merits by the present Commissioners, none of whom were aware of the ex parte contacts with Mack or permitted similar representations. The majority of the Commission recommend, however, that such new consideration be on the basis of the existing record, including the Initial Decision of the Hearing Examiner of August 10, 1955, and the exceptions thereto, with no further hearing contemplated and with no demerit to Mid-Florida by reason of the events which came to light and resulted in the remand.

The Chairman is of the view, which the majority of the Commission do not accept, that while Mid-Florida is not disqualified some demerit should be considered against Mid-Florida due to his view, along with that of the Examiner, that officers of Mid-Florida knew of the ex parte conversations of its counsel with Commissioner Mack. In light of some consequent impairment of Mid-Florida's qualification and, also, the "serious question concerning the character of WORZ's principals," discussed in the Commission's Decision of June 1957, Chairman Minow would recommend to the Court that the Commission be authorized to decide – after a new oral

argument – whether to grant one of the existing applications (of Mid-Florida and WORZ) or to reopen the record for new applications.

We accept the view that neither Mid-Florida nor WORZ is disqualified; but in line with the Chairman's position we hold that the Commission is authorized to decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications. Furthermore, we hold in arriving at its decision on all matters, including the question of reopening, the Commission shall consider the serious question concerning the character of WORZ's principals. It shall also consider the weight to be given to the Roth incident at a time when Roth was secretary of Mid-Florida and a stock subscriber in the corporation, as well as the fact that, although the Commission has concluded Mid-Florida's principals were not aware of their attorney's ex parte communications with former Commissioner Mack, even so such communications were in fact made by Mid-Florida's attorney.

Nothing we have said is intended to preclude the Commission from deciding that the record is so stale,[1] the filing of new applications should be

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[1] It is unlikely that any of the incidents herein complained of would have occurred if either the Commission or the parties had had the benefit of our opinions in **Massachusetts Bay Telecasters** v. **F. C. C.**, 104 U. S. App. D. C. 226, 261 F. 2d 55 (1958), **cert. denied — sub nom. WHDH, Inc.** v. **Federal Communications Comm'n**, 366 U. S. 918 (1961); **WKAT** v. **Federal Communications Comm'n**, 103 U. S. App. D. C. 324, 258 F. 2d 418 (1958); **Sangamon Valley Television Corp.** v. **United States**, 106 U. S. App. D. C. 30, 269 F. 2d 221 (1959).

permitted. Mid-Florida has been operating on Channel 9 at Orlando under program test authority issued January 31, 1958, pursuant to the Commission's rules, but this authorization was granted prior to our affirmance on May 15, 1958, of the Commission's first comparative decision. Revelations as to various situations prior to that date and the more recent developments may point to the need for a new public interest determination of who should have the license to operate on the channel.

The record upon which the decisions by the Commission shall be made shall include also all proceedings had upon the remand of the case by this court to the Commission.

It is so ordered.

Supreme Court of the United States
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962
No. 13,996
WORZ, INC., APPELLANT
v.
FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE
MID-FLORIDA TELEVISION CORPORATION,
INTERVENOR

On Federal Communications Commission's Report and Recommendation Following Remand by this Court on May 21, 1959

Before: FAHY, WASHINGTON and DANAHER
Circuit Judges

JUDGMENT

This case came on for consideration on the Report and Recommendation filed by the Federal Communications Commission following remand by this court and on the supplemental record and briefs of the parties, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that this case is hereby remanded to the Federal Communications Commission for further proceedings consistent with the opinion of this court.

Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed Sept. 23, 1963. Nathan J. Paulson, Clerk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963
No. 13,996

WORZ, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

MID-FLORIDA TELEVISION CORPORATION, INTERVENOR

Before: BAZELON, Chief Judge; WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and MCGOWAN
Circuit Judges in Chambers

ORDER

On consideration of appellant's petition for rehearing *en banc*, of appellee's answer thereto and of intervenor's opposition to appellant's petition, it is

ORDERED by the court, that appellant's petition is hereby denied.

Per Curiam.

Dated: Sept. 23, 1963

United States Court of Appeals for the District of Columbia Circuit. Filed July 5, 1963. Nathan J. Paulson, Clerk.

DANAHER, *Circuit Judge*: WORZ, Inc. seeking a rehearing *en banc*, has attacked this court's opinion of July 5, 1963, because of its alleged failure to provide adequate guidance to the Commission as it reconsiders on remand "all matters" to be presented. The Commission in its opposition expresses its view that the court's opinion makes clear that it accepted the Commission's finding,[1] and rejected appelant's view of the record." Any such limited conclusion falls so far short of my interpretation of what this court was saying, I feel impelled to be specific as to why I joined in the opinion.

First, we accepted the Commission's majority conclusion that upon reconsideration neither Mid-Florida nor WORZ is to be deemed automatically disqualified, importantly because the Commission and the parties had not, in the day and time of it, had the benefit of the views expressed in the cases cited in footnote 1 of our opinion.

Next, we *rejected* the majority Commission recommendation that new consideration be merely "on the basis of the existing record," "with no further hearing contemplated and with no demerit to Mid-Florida by reason of the events which came to light and resulted in the remand." (Slip opinion, p. 3). Instead, we specified that the Commission in its decisions "on all matters,"

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[1] The Commission's memorandum thus interprets our opinion to say only that the record support "the Commission's finding that the principals of Mid-Florida Television Corporation were not aware of and did not ratify certain **ex parte** presentations (sic) made by one William H. Dial."

(and there were many), shall review and consider the record which "shall include also all proceedings had upon the (previous) remand of the case by this court."[2]

By "all matters," we intended, *inter alia*, to *includes:* (1) a determination as to whether or not to reopen the record and to permit the filing of new applications and their consideration upon a new record[3]; (2) in making that decision, the reassessment by the Commission of the qualifications of both Mid-Florida and WORZ, Inc.; (3) that in reappraising such qualifications of the parties named, the Commission should weigh the serious question as to the character of WORZ's principals; at the same time, the Commission should weigh the effect of Mid-Florida's acceptance of whatever deceptive activities Roth had engaged in, as found by the Commission, at a time when he was secretary of and a stock subscriber in the Mid-Florida Corporation, and also show upon the record what effect the Commission would give to Roth's conduct and to Dial's *ex parte* activities in behalf of Mid-Florida at a time

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We said more. We left open to the Commission to decide, in the first instance, whether Mid-Florida could insulate itself by unawareness from the consequences of improper activities expended in its behalf by its attorney.

[2] We noted (Slip op. p. 5) that there were revelations of situations prior to our 1958 remand and more recent developments which might point to the need for a new public interest determination as to what licensee should be permitted to operate on channel 9, Orlando.

[3] Compare Fort Harrison Telecasting Corporation et al. v. Federal Communications Commission, —— U. S. App. D. C. ——, F. 2d ——, Slip op. p. 16, (17,279, 17,356, 17,380, decided June 27, 1963).

when he was acting as its attorney; in short, even if the Commission, contrary to its hearing examiner, could find that Mid-Florida's principals at the time did not know of such activities, whether or not Mid-Florida should be permitted to receive and retain the benefits, without being accorded the detriment, of the misconduct of its agents; (4) a decision by the Commission after new oral argument on all aspects of all matters, whether or not a new public interest determination should be ordered[4] since all the record is so stale; and, finally, if so, acceptance of new applications from new untarnished applicants should not require excluding the present parties from participation in the reopened proceedings.

Our opinion in my understanding of it said at least this much, quite enough to enable the Commission to act accordingly. I vote against rehearing *en banc*.

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[4] Cf. Sangamon Valley Television Corp. v. United States, 111 U. S. App. D. C. 113, 294 F 2d 742 (1961).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 698

WORZ, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR MID-FLORIDA TELEVISION CORP. IN OPPOSITION

MARCUS COHN
Counsel for Respondent,
Mid-Florida Television Corp.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR MID-FLORIDA TELEVISION CORP. IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 323 F. 2d 618 (C.A.D.C.); the order by that Court denying a Petition for Rehearing *en banc* is reported with the main opinion. The Report and Recommendation of the Commission is not officially reported, but is unofficially reported at 22 Pike and Fischer R.R. 125.

JURISDICTION

The judgment of the Court of Appeals remanding this cause to the Federal Communications Commission was entered on July 5, 1963 (Pet. App. 6A). The order denying Petitioner's request for a rehearing *en banc* was dated September 23, 1963 (Pet. App. 7A). The Petition for a Writ of Certiorari was filed December 23, 1963. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Intervenor does not agree with the statement of questions presented as set forth in the Petition, pp. 2-3. Intervenor believes the questions presented are:

(1) Whether the Commission and the Court of Appeals were correct in determining that Mid-Florida Television Corp. (Mid-Florida), an applicant for a construction permit for a new television broadcast station at Orlando, Florida, was not disqualified to be a television licensee due to *ex parte* contacts made to former Federal Communications Commissioner Mack by William H. Dial, when the *ex parte* contacts were in no way initiated, secured, aided, or authorized by Mid-Florida, and when the principals of Mid-Florida had no knowledge whatsoever that such contacts had been made until public knowledge thereof was given by the Congressional Subcommittee on Legislative Oversight; and

(2) Whether the Court of Appeals could only have sustained the Commission's reversal of the ultimate factual determinations of its Examiner if those determinations were "clearly erroneous" or were overcome by a "very substantial preponderance of the evidence."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the pertinent statutory sections involved in the instant proceeding are set forth in the Petition, p. 4.

STATEMENT

Petitioner seeks certiorari on a decision by the Court of Appeals for the District of Columbia Circuit which reviewed a Report and Recommendation made by the Federal Communications Commission, and which remanded the matter to the Commission for further proceedings.

In 1952 and 1953, respectively, Petitioner, WORZ, Inc. (WORZ) and the Intervenor below, Mid-Florida, applied for authority to construct a new television station at Orlando, Florida. A comparative hearing was held on these applications before Hearing Examiner Basil P. Cooper and, in 1955, Cooper proposed that the WORZ application be granted and the Mid-Florida application denied (R. 1567-1657; 2315-2405).

Mid-Florida and the Commission's Broadcast Bureau contested the Examiner's decision and urged that the decision rested on erroneous findings and conclusions. Oral argument was held before the Commission *en banc* on June 19, 1956, and on June 7, 1957, the Commission released its decision overruling the recommendations of the Examiner, and granting Mid-Florida's application (R. 1720-1844; 2523-2617; 32 F.C.C. 1254).[1] The Commission found, on the basis-

[1] Commissioners McConnaughey, Bartley, Doerfer, Lee and Mack voted to grant Mid-Florida's application. Commissioner Hyde did not participate and Commissioner Craven abstained. Commissioners McConnaughey, Lee, Doerfer and Mack were no longer members of the Commission when the Commission later rendered the further Report and Recommendation now under review.

of the usual standard comparative criteria utilized in cases of this nature, that Mid-Florida was the better qualified applicant. The Commission held further that WORZ had intentionally concealed the fact that the father of the WORZ principals, William O. Murrell, Sr., was a party-in-interest to the WORZ application (R. 1803-1810; 2606-2613; 22 FCC at 1330-1336). The Commission criticized Mid-Florida for the conduct of one of its officers, Hyman Roth, an attorney, and at the time the President of the local Bar Association, who failed to disclose his personal interest in the case when he called the Commission's attention to disbarment proceedings against Murrell, Sr. (R. 1810-1811; 2613-2614; 22 F.C.C. at 1336-1337). The Commission held, however, that neither the conduct of WORZ's principals nor the conduct of Mid-Florida's officer warranted disqualification (R. 1811, 1813; 2614, 2616; 22 F.C.C. at 1337, 1339).

WORZ thereupon appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, which, in a *per curiam* opinion of May 15, 1958, affirmed the Commission's decision and denied a WORZ Petition for Rehearing *en banc*.[2]

WORZ thereafter filed a Petition for Certiorari in this Court. The United States and the Commission filed a Brief in Opposition urging that the Writ be denied on the merits. The Brief, however, pointed out that during the hearings conducted before the Subcommittee on Legislative Oversight on June 2, 1958 (which hearings were held subsequent to the 1958 deci-

[2] *WORZ, Inc.* v. *Federal Communications Commission*, 257 F. 2d 199 (C.A.D.C.). Petition for Rehearing *en banc* denied June 10, 1958.

sion by the Court of Appeals affirming the Commission's decision), it was brought out that, while the case was pending before the Commission, a resident of Orlando made an *ex parte* presentation regarding the qualifications of WORZ to a member of the Commission. In light of this fact, the Solicitor General and the Commission recommended that the denial of Certiorari should not foreclose any future action which the Commission might take with regard to the information contained in the Hearings.[1] The Court granted Certiorari on October 27, 1958, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals "for such action as it may deem appropriate."[2]

Argument was had before the Court of Appeals on the question of the further appropriate procedures to be followed, and the Court ultimately remanded the case to the Commission, with instructions to hold an evidentiary hearing to determine the nature and source of all *ex parte* pleas and other approaches that were made to the Commissioners while the proceedings were pending, and any other factors that might be thought to require either disqualification of some Commissioners from participating in the reopened proceeding or disqualification of some parties from receiving any award that may ultimately result.[3] The Court of Appeals retained jurisdiction of the case.

[1] *WORZ, Inc. v. Federal Communications Commission*, 358 U.S. 55.

[2] *WORZ, Inc. v. Federal Communications Commission*, 268 F. 2d 887, 890 (C.A.D.C.).

[3] A request by WORZ for rehearing *en banc* of the remand was unanimously denied on June 5, 1959. WORZ's subsequent Petition for Writ of Mandamus in the Supreme Court was denied (361 U.S. 805).

Following the remand by the Court, the Commission on July 29, 1959, ordered that the record be reopened and a further hearing held on the *ex parte* matter (Supp. R. 2618-2619; 2912-2913).

The evidence at the further hearing showed that Dial did, in fact on two occasions discuss the case with Commissioner Mack. Dial, however, testified that (a) he did not inform Mid-Florida before the meetings of his intention to discuss the case with Mack, (b) that following his conversations with Mack and prior to the final decision, he did not reveal to Mid-Florida that these conversations had taken place, and (c) that in making these approaches he was acting solely in his own behalf as a citizen of the community involved and in furtherance of what he believed to be the community's best interest.[3] Dial's testimony in this regard was fully and completely corroborated by the testimony of Mid-Florida's principals and by the testimony of Mid-Florida's Washington counsel who was charged with the prosecution of the Mid-Florida application before the Commission.[4] This evidence clearly demonstrated that Mid-Florida had not in any way retained Dial for the purpose of making any *ex parte* contacts whatsoever, and that Mid-Florida first learned of Dial's *ex parte* activities when the matter was brought to light in the Congressional Hearings long after the Commission had rendered its 1957 Final Deci-

[3] Supp. R. 2672-74; 2830-31; Tr. 228-30; 231-15; 238-40; 247-9; 253-55; 2301-05; 2307; 2317-20; 2458-61; 2462; 2500.

[4] Supp. R. 2852-71; Tr. 250-51; 257-61; 2611-17; 2652; 2658-59; 2672-2; Supp. R. 2700-36 (Brosnan); Tr. 2743-55; 2777; Supp. R. 2714-41 (Kluge); Tr. 2993; 3000-09; 3014-15; 3023-24; 3043 (Dobie). (Supp. R. citations refer to that portion of the record filed after the hearing on the remand.

sion granting the frequency to Mid-Florida.[*] Accordingly, the Examiner found that Mid-Florida had not directly or indirectly "secured or aided" Dial's activities in discussing the case with Mack (Supp. R. 2856-57; 22 Pike and Fischer R.R. at 1333-34), and accepted the testimony of all of the principals of Mid-Florida and Dial himself that Dial had not been retained for this purpose and that no person connected with Mid-Florida had requested Dial to intervene with Mack. The Examiner further found and concluded (Supp. R. 2853; 22 Pike and Fischer R.R. at 1331):

> "There is no direct or affirmative evidence as such that in his ex parte approaches herein above found, Dial was acting under instructions from, or with the knowledge and consent of, the Mid-Florida group, of that he ever informed them, prior to the action of the Congressional Committee, . . . that he had any conversation with Mack concerning the case.

Notwithstanding the absence of any direct evidence linking Mid-Florida with Dial's *ex parte* conversations and despite the fact that the evidence demonstrated that Mid-Florida did not retain Dial for the purpose of making these contacts nevertheless, Hearing Examiner Cunningham concluded in his Initial Decision released September 19, 1961 that at some unspecified time and in some unspecified manner Mid-

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[*] The Hearing Examiner specifically found that Dial, a local Orlando lawyer, was retained by Mid-Florida solely to legally investigate the so-called "Radio Row" matter and to report to Mid-Florida any developments before the local Bar concerning it so that Mid-Florida would have at its disposal all of the facts presently to the Commission which it was considering. Hearing Examiner Cunningham's Initial Decision (Supp. R. 2850; 22 Pike and Fischer R.R. at 1327).

Florida had become aware of and had "ratified" Dial's improper representations. This conclusion was not based upon the demeanor or evasiveness of the witnesses who testified before him, but instead was based upon his belief that as a matter of "normal human experience" it was "inconceivable and incredible" that Dial would not and did not notify the Mid-Florida group of his activities after they had taken place. The Examiner thereupon concluded that the alleged "knowledge and ratification" of Dial's activities demanded that Mid-Florida be disqualified, and that the participation of Mack in the Commission's 1957 decision rendered the proceedings void (*Id.* at 2856-57; 22 Pike and Fischer R.R. at 133-34).

Mid-Florida took exception to the Examiner's decision and the case was considered by the Commission *en banc*. On January 3, 1963, the Commission released its Report and Recommendation (22 Pike & Fischer 125). The Commission concurred with the Examiner's conclusions that as a result of Dial's contacts with Mack the original proceeding was void, and held that its 1957 decision had to be set aside and a new decision rendered. Moreover, the Commission accepted the basic findings of fact of the Examiner. It held, however, that the evidence did not support the Examiner's determination that Mid-Florida had learned of or ratified Dial's activities. The crux of the Commission's disagreement with the Examiner was stated as follows (22 Pike & Fischer at 126(e)):

> Review of the record reveals no evidence which might lend support to the Examiner's conclusion, and, as he admitted in his initial decision, "there

is no direct evidence, as such, rebutting [the] assertions [of Dial and Mid-Florida's principal]". As noted in our findings, Dial and Mid-Florida's principals have steadfastly denied that the latter were the inspiration for, or were informed of, Dial's conversations with Mack. Sworn denials, while not conclusive of the facts, are not to be brushed aside lightly on the basis of an indefinable "normal human experience." This is not to say that the circumstances of Dial's conversations with Commissioner Mack might not raise a reasonable suspicion that Mid-Florida's principals were connected therewith in some manner. Such suspicion, however, is overcome by the sworn testimony, unimpeached on this record, of Dial, Kluge, Breckner, and Dobin. Suspicion, speculation, and conjecture are not proper substitutes for evidence, and cannot of themselves form the basis for conclusions that an applicant engaged in improper conduct requiring its disqualification and that two or more witnesses testified falsely. Thus, it is concluded that Mid-Florida did not secure, aid, confirm, ratify, or have knowledge of Dial's conversations with Mack and that nothing revealed in the instant proceedings can be held to detract from Mid-Florida's qualifications as a licensee of this Commission.

Chairman Minow concurred in the majority's conclusion that Mid-Florida was not to be disqualified. He felt, however, that the Examiner's determination that Mid-Florida had learned of and ratified Dial's conduct should be accepted. Chairman Minow was of the view that the Commission, after a new oral argument, should decide whether to grant one of the existing applications or to reopen the record for new applications (22 Pike & Fischer at 126(c)-126(h)).

Upon the filing by the Commission of its Report and Recommendation with the Court of Appeals, WORZ

urged that the Commission's conclusions were erroneous and should be set aside.

The Court of Appeals on July 5, 1963 issued its decision and remanded the cause to the Commission for further proceedings. The Court accepted the view of all the Commissioners that Mid-Florida in no way initiated, secured, requested or retained Dial for the purpose of making the *ex parte* conversations and that neither Mid-Florida nor WORZ was disqualified (Pet. App., p. 5A). It also accepted the determination of the majority that Mid-Florida had not been aware of these conversations or ratified them. However, the Court believed that Chairman Minow's recommendations as to further proceedings were more appropriate and held "in line with the Chairman's position . . . that the Commission is authorized to decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications." The Court further instructed that the Commission should consider what it termed "the serious question concerning the character of WORZ's principals," the Roth incident, and the Dial incident. With reference to the latter, it stated that "although the Commission has concluded Mid-Florida's principals were not aware of their attorney's *ex parte* communications with former Commissioner Mack, even so such communications were in fact made by Mid-Florida's attorney." (Pet. App., p. 5A)

WORZ petitioned for rehearing *en banc*, which was denied on September 23, 1963 and WORZ thereupon filed its Petition for Certiorari.

ARGUMENT

The Petitioner first seeks to have this Court review the 1958 decision of the Court of Appeals which affirmed the Commission's 1957 decision (Pet., pp. 18-20). The Commission, with the approval of the Court of Appeals, has however already declared that the 1957 decision is void, and this Court has vacated the Court of Appeals' 1958 decision (358 U.S. 55). Therefore, the Court of Appeals' 1958 decision and the 1957 Commission decision are no longer subject to review. If Petitioner is dissatisfied with any future Commission decision, it can appeal the decision to the Court of Appeals and, if appropriate, to this Court.

Second, Petitioner contends that even though Mid-Florida did not secure, aid or retain Dial in his *ex parte* contacts, had no knowledge of them, and did not ratify them, nevertheless, as a matter of law, Mid-Florida must be disqualified (1) because Dial was an attorney-agent of the application and (2) because failure to disqualify Mid-Florida would permit it to retain the benefits of Dial's improper conduct (Pet., pp. 20-22). A client, however, is not bound by improper acts of an attorney, such as those disclosed here, when those acts are not within the scope of his employment, where the client was not aware they had taken place, and where the client never ratified them. In the instant case, the Hearing Examiner, the Commission, the Court of Appeals, and the concurring Commissioner all agreed that Mid-Florida in no way initiated, aided, sanctioned, or otherwise expressly or impliedly retained Dial for the purpose of making the *ex parte* contacts and therefore it is quite plain that these activities were not within

the scope of Dial's authority.[9] *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514 (3d Cir.), upon which Petitioner relies, makes clear that before a client will be charged with the conduct of an attorney in attempting to influence a decision, it must be demonstrated that the acts were undertaken pursuant to the client's instructions, and with his knowledge or acquiescence. In *Root* the Court specifically formulated an issue as to whether the purpose of the attorney's employment or retainer was the expectation that the lawyer would exercise improper influence.[10] Where the client did not retain the attorney for this purpose, had no knowledge of his conduct, and did not ratify it, it would be manifestly unjust to disqualify the client. The decision of the Commission that Mid-Florida was not disqualified was clearly within the Commission's discretionary power; it was correct and the Court of Appeals properly accepted the Commission's determination in this regard.

Further, Petitioner's assertion that Mid-Florida will be permitted to retain the "fruits" of Dial's conduct is clearly incorrect. The Commission has now set aside its 1957 decision awarding the frequency to Mid-Florida, and Mid-Florida is again placed in the position which it held in 1957 prior to the Commission's grant; it must seek to overturn Hearing Examiner Cooper's Initial Decision which proposed a grant to WORZ and a denial of the Mid-Florida application. Moreover, the Commission, under the Court of Ap-

[9] Dial in fact was not even a general attorney for Mid-Florida, but had been retained for one specific and limited purpose—to investigate the Roth matter and to report on his investigations to Mid-Florida. See fn. 5, *supra*.

[10] See 169 F. 2d at 520, 536.

peals' decision, must consider what comparative demerit, if any, Dial's unauthorized activities may have upon its qualifications, even though it in no way authorized them or had any knowledge concerning them. Finally, under the Court of Appeals' opinion, the Commission is authorized to reopen the proceedings to other applicants. Thus, Mid-Florida has been completely insulated from any possible benefits it might have received as a result of Dial's unauthorized activities. The Commission's decision on the merits of this controversy will now be made by Commissioners who had no contact with Dial and who, as both the Commission and the Court of Appeals found, were not improperly approached in any manner concerning the case.

Finally, Petitioner argues that under *Universal Camera Corp.* v. *National Labor Relations Board* (340 U.S. 474), the Commission did not have the power to overrule Hearing Examiner Cunningham's findings because there did not exist in the record "a very substantial preponderance of the testimony" to support the Commission's decision (Pet., pp. 22-25). In effect, Petitioner contends that the Commission could only reverse its Examiner if his factual determinations were "clearly erroneous," [11] a rule rejected by this Court in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358.

Universal Camera itself, held that the "clearly erroneous rule" was not applicable to, and was wholly inconsistent with, the powers of regulatory agencies

[11] As this Court pointed out in *Allentown Broadcasting, infra*, the "clearly erroneous" rule is substantially identical to the "very substantial preponderance" rule urged by Petitioner. See 349 U.S. at 364

such as the Commission. The Court held that the same standard of review normally applied to agency actions, namely, substantial evidence on the whole record, applied. The *Allentown Broadcasting* cases reaffirmed this Court's decision in *Universal Camera* and specifically rejected the contention urged here by Petitioner, *i. e.*, that an Examiner's determinations are not to be overruled by the Commission without a "very substantial preponderance in the testimony as recorded." This Court held in *Allentown* that such a standard was an erroneous standard of review even where the Hearing Examiner's determinations were based upon findings as to "demeanor" of the witnesses. Thus *Allentown Broadcasting* and *Universal Camera* stand for the proposition that the decisions of the Commission will not be disturbed where substantial evidence exists on the whole record to support them even where the Commission reverses a Hearing Examiner who had made findings on the "demeanor" of the witnesses, and where "credibility" was in issue. *A fortiori* the Court of Appeals' decision in this case affirming the Commission was correct since the determinations of the Examiner here were *not* based upon demeanor or evasiveness, but upon his opinion as to "human experience" and upon his opinion as to the inferences to be drawn from the nature of the testimony. The Commission was equally competent to the fullest degree to evaluate the testimony and it had full power to reject the erroneous speculations which the Examiner had utilized in arriving at his determination.

The Commission viewed the facts as requiring the conclusion that Mid-Florida was unaware of Dial's activities. This determination was clearly consistent

with the evidence and supported by substantial evidence on the whole record.[12] Under these circumstances, Petitioner's allegations that the Commission was without power to reach such a determination are without merit.

CONCLUSION

The decision below is correct, the Court below applied the proper standards in reviewing the Commission's decision, and no question warranting further review is presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARCUS COHN
Counsel for Respondent,
Mid-Florida Television Corp.

January 22, 1964.

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[12] It was entirely within the Commission's authority to give full weight and credit to the sworn uncontradicted testimony of Dial and Mid-Florida's principals concerning Mid-Florida's lack of knowledge of what Dial had done. *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 214-216-20; *Dickinson v. United States*, 346 U.S. 389, 396-97.

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719-160—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 698

WORZ, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND MID-FLORIDA TELEVISION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A) is reported at 323 F. 2d 618. Its order denying rehearing *en banc*, Judge Danaher concurring (Pet. App. 7A), is reported with the main opinion. The Report and Recommendation of the Federal Communications Commission is not officially reported. It is unofficially reported at 22 Pike & Fischer, Radio Regulation 125.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1963 (Pet. App. 6A). A petition for rehearing *en banc* was denied on September 23, 1963 (Pet. App. 7A). The petition for a writ of certiorari was filed on Monday, December 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed the Commission's determination that Mid-Florida Television Corp., one of two applicants for a broadcast license, was not absolutely disqualified by reason of *ex parte* communications of its agent, which the Commission found were unknown to, and unratified by, it.

STATEMENT

In 1957, after a full comparative hearing, the Commission authorized Mid-Florida Television Corp. to construct a new television station on Channel 9 in Orlando, Florida, and denied the competing application of petitioner WORZ, Inc. (22 F.C.C. 1254). The decision was based upon comparative grounds and neither applicant was disqualified. Upon appeal by WORZ, the court of appeals affirmed *per curiam* (257 F. 2d 199), and WORZ filed a petition for a writ of certiorari. In a brief in opposition, the Solicitor General and Commission counsel pointed out that testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, subsequent to the

decision of the court of appeals, indicated that *ex parte* presentations had been made to a member of the Commission during the comparative hearing by a person who had represented Mid-Florida in a Florida legal matter. The brief in opposition advised the Court that the Commission had instituted an inquiry and that a denial of certiorari would not be considered as foreclosing future action by the Commission.

In reliance upon these representations, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for appropriate action (358 U.S. 55). On remand, the court of appeals vacated the Commission's order and remanded the case for hearing before a specially appointed hearing examiner to inquire into all *ex parte* contacts. The court retained jurisdiction pending its further order (268 F. 2d 889).

1. PROCEEDINGS BEFORE THE COMMISSION

The Commission thereupon reopened the record for further hearing upon the following issues (R. 2618–2619):[1]

> 1. To determine whether any of the members of the Commission who participated in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 9 in Orlando, Florida, should be disqualified from participating in the reopened proceedings.

[1] References to "R. —" are to the original record filed with the court below. References to "J. App. —" are to the printed joint appendix below.

2. To determine whether any person or persons influenced or attempted to influence any member of the Commission with respect to the proceedings * * * in any manner whatsoever except by the recognized and public processes of adjudication.

3. To determine whether any party to the proceedings * * * directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceedings.

4. To determine in the light of the facts adduced upon the foregoing issues, whether any of the applicants in this proceeding should be disqualified from receiving a grant of its application; and whether the conduct of any applicant, if not a disqualifying character, has been such as to reflect adversely upon such applicant from a comparative standpoint.

On September 19, 1961, after a full hearing, the special examiner issued an Initial Decision (J. App. 18-32) in which he concluded that Mid-Florida was disqualified from receiving a grant of its application because it had been aware of, and had ratified, improper *ex parte* representations by an attorney, William H. Dial, to former Commissioner Mack during the comparative hearing. The examiner ruled that the original proceeding was void. He also found that no other Commissioner had received any *ex parte* representations; and that none of the principals of WORZ had attempted any misconduct of that nature (J. App. 31).

On January 8, 1963, the Commission (J. App. 32–41) reversed the examiner's conclusion that the principals of Mid-Florida had knowledge of and ratified the *ex parte* representations to Commissioner Mack, and held that "nothing revealed in the instant proceeding can be held to detract from Mid-Florida's qualifications as a licensee" (J. App. 39). The Commission agreed with the examiner's conclusions that Dial's contacts with Mack were improper, and that, as a result, the original proceeding was void (J. App. 38–39). It also agreed that no present member of the Commission was disqualified from participating in the reopened proceeding (J. App. 39). The Commission recommended that the court of appeals remand the case to the Commission for a new decision on the comparative qualifications of the applicants on the basis of the existing record but after further oral argument (J. App. 40).[2]

Dissenting in part (J. App. 41–45), Chairman Minow expressed the view that while the record did not require Mid-Florida's disqualification, it did significantly impair Mid-Florida's comparative standing as an applicant. Observing further that serious questions also existed concerning the character of WORZ's principals, the Chairman recommended that the court authorize the Commission to decide, after

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[2] The Commission directed its General Counsel to transmit its Report and Recommendation to the court of appeals (J. App. 40).

a new oral argument, whether to grant one of the existing applications or to reopen the record for new applications (J. App. 42, note 1).[3]

2. THE COURT OF APPEALS DECISION

The court of appeals accepted the Commission's findings that the principals of Mid-Florida had not been aware of Dial's conduct, and its conclusion that Mid-Florida was not disqualified (Pet. App. 5A). It held, however, in accord with Chairman Minow's position, that the Commission should decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications (Pet. App. 5A). In arriving at its decision on all matters including the reopening, the court directed that the Commission (Pet. App. 5A)—

> shall consider the serious question concerning the character of WORZ's principals. It shall also consider the weight to be given to the Roth incident at a time when Roth was secretary of Mid-Florida and a stock subscriber in the corporation,[4] as well as the fact that, although the Commission has concluded Mid-Florida's

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[3] Commissioners Craven and Henry did not participate in any of the proceedings.

[4] In its original decision (22 F.C.C. 1254) granting the application of Mid-Florida, the Commission found that the stockholders of WORZ had attempted to conceal material facts concerning the interest of one William O. Murrell, Sr., in the proposed television station and an existing radio station which they controlled, and that one Hyman N. Roth, a secretary and director of Mid-Florida, had sent a letter to the Commission concerning the pendency of disbarment proceedings against Murrell in the name of the secretary *of the local bar association*, in which he concealed his authorship of the letter.

pri. cipals were not aware of their attorney's ex parte communications with former Commissioner Mack, even so such communications were in fact made by Mid-Florida's attorney.

The court of appeals subsequently denied WORZ's petition for rehearing *en banc*.[5]

ARGUMENT

1. The decision of the court of appeals is clearly interlocutory. Its interlocutory character, as shown by the remand for a comparative proceeding, is emphasized by the court's intimation that the record may now be so stale that the Commission may wish to entertain new applications. The Commission has been directed to consider the conduct of both applicants. No broadcast license will be issued until the completion of these further administrative proceedings and any judicial error now complained of, which might hypothetically diminish petitioner's chances to obtain the license, may not survive. Indeed, the full meaning of the court's decision cannot be appreciated until it is brought to bear in the comparative proceedings. Thus, review at the present time seems plainly inappropriate. See *Land* v. *Dollar*, 330 U.S. 731, 734.

There is no conflict between the decision below and *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (C.A. 3), cited by petitioner as establishing a rule of absolute disqualification. There, the principals themselves were found to have engaged in an "illicit combination * * * to obstruct justice" in a

[5] In a concurring statement, Circuit Judge Danaher explained his interpretation of the court's directions on remand (Pet. App. 7A-2).

patent infringement case (*id.* at 534). Nor is this case like *WKAT, Inc.* v. *Federal Communications Commission*, 296 F. 2d 375 (C.A. D.C.), certiorari denied, 368 U.S. 841, where the Commission, following *Root*, disqualified three applicants who had attempted to win the case by off-the-record presentations. Indeed, the standard applied by the Commission in this case was suggested by the court's remand instructions in the first *WKAT* case (258 F. 2d at 420) in which it directed that findings be made as to—

> whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct found by the Commission to have occurred * * *.

Here, the Commission found that Mid-Florida was not aware of, and did not ratify, Dial's *ex parte* contacts. Accordingly, its disqualification was not required by the rule established in *WKAT* (296 F. 2d 375) and *Root*. On the other hand, the court's remand instructions direct the Commission "in arriving at its decision on all matters, including the question of reopening" to consider the fact that such communications were in fact made by Mid-Florida's attorney, albeit without the company's knowledge. (Statement, *supra*, pp. 6–7). Judge Danaher, explaining these instructions, indicated that the Commission must still determine whether "Mid-Florida should be permitted to receive and retain the benefits, without being accorded the detriment, of the miscon-

duct of its agents."[6] We take no position on this issue now, except to point out that its presence in the forthcoming comparative proceedings emphasizes the interlocutory nature of the decision below. In addition, the court's instructions are a complete answer to petitioner's argument (Pet. 21–22) that the court (as well as the Commission) erred in failing to charge Mid-Florida with the consequences of the misconduct of its attorney.

2. Petitioner also attacks (Pet. 22–25) the Commission's evaluation of the evidence and its finding that Mid-Florida's principals had no knowledge of the wrongful actions of the attorney Dial. The Commission accepted the testimony of Dial and of Mid-Florida's principals to that effect. It was acting within permissible limits when it reversed the hearing examiner, and the court's affirmance of this decision is correct. See *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364.[7] In any event, such questions of the substantiality of the evidence supporting an agency's order are for the court of appeals. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

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[6] Judge Danaher concurring in the order denying WORZ's petition for rehearing *en banc* (Pet. 7A, p. 4).

[7] Petitioner (Pet. 19–20) also refers to the Commission's evaluation of the evidence before it in 1957, when it held that WORZ had failed to disclose the true parties in interest and that these parties had not behaved with candor. Since this action of the Commission was taken when passing upon the license application the first time and the award of the license has been set aside by the court of appeals, this argument is not pertinent to the present reopened proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
MICHAEL I. MILLER,
Attorneys.

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel.

ERNEST O. EISENBERG,
Counsel,
Federal Communications Commission.

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